

# BACE LAW REPORT

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LEGAL NEWSLETTER

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## Premises Liability and Your Summer Swimming Pool

Along with warm weather, the summer season brings barbeques, pool parties, and vacation stays that may include lounging around hotel pools. Undoubtedly, one will read a collection of the following phrases at some juncture this summer: “No lifeguard on duty”; “Swim at your own risk”; and, “No diving.” It is not a coincidence, or for posterity that business owners ensure these words are located conspicuously around their pools; their aim is to lessen or avoid liability in the event of an injury.

Some potential home buyers view a built-in pool as a negative aspect of the sale, due to the inherent danger and liability associated with them. Data suggests these home buyers are not overreacting. According to the Centers for Disease Control and Prevention (CDCP), in

2005, of all children 1 to 4 years old who died, almost 30% died from drowning. Among that same group, most drowning accidents occur in residential swimming pools. The majority of those accidents were children who had been out of sight for *less than five minutes*, and in the care of one or both parents at the time. This newsletter attempts to briefly summarize, to the extent possible, the liability issues and how one can limit exposure to liability pursuant to the use of a swimming pool. Swimming pools are inherently dangerous, and will increase both a homeowner’s or a semi-public pool owner’s exposure to civil liability.

### General Premises Liability

Generally, the area of premises liability is operative in the event someone is injured at an owner’s property. A landowner owes a common-law duty of “reasonable care” to all

persons lawfully on the premises. This means landowners are legally obligated to *maintain the property in a reasonably safe condition*.

Mounsey v. Ellard, 363 Mass. 693, 708 (1978).

Owners are also required to *warn* visitors of any unreasonable dangers of which the landowner is aware or reasonably should be aware.

O'Sullivan v. Shaw, 431 Mass. 201, 204 (2000).

Landowners do not have to supply a completely safe area, but only one which would be safe to a person who exercises such minimum care as the circumstances reasonably indicate. Lyon v.

Morphew, 424 Mass. 828, 833 (1997).

Generally, there is no legal duty to warn of dangers that are *open and obvious* on the premises, because the law assumes ordinarily reasonable visitors would not be injured by blatant dangers. O'Sullivan v. Shaw, 431 Mass. 201, 204 (2000). Clearly, whether or not these duties are met, vary wildly given the facts and circumstance.

These general principles of premises

liability are applicable to swimming pools, but clarity on the law is scarce in this area. In 2000, the Supreme Judicial Court held that pool owners owe *no duty* to swimmers who dive into the shallow end of the pool. O'Sullivan v. Shaw, 431 Mass. 201 (2000). Diving head-first into a shallow pool, is a open and obvious danger, of which reasonable people are aware. Thus, pool owners are not legally required to warn or take steps to ensure the safety of head-first divers.

The above is an extreme case of an open and obvious danger resulting in injury. Most real-life situations will not be so clear, and will require an analysis of whether or not the pool owner owed a duty, and the scope of that duty to warn or provide safety measures. Courts will decide whether or not the duty was breached by some failure to warn or ensure safety on behalf of the pool owner, and whether or not that breach caused the victim's injuries.

### **Attractive Nuisance**

A higher duty of care, to ensure safety or

warn of your dangerous pool, is required of owners when the victim is a child. There exists a long history of young victims who wandered onto property, attracted by some dangerous object, and were injured; Pools are no exception. One could argue that a pool is both inherently attractive to children, and incredibly dangerous. Thus, the Commonwealth has enacted M.G.L. Chapter 231 § 85Q, which under certain circumstances holds landowners liable if *trespassing children* are injured on their property. All of the following conditions must be met:

- (a) ...land owner knows or has reason to know that children are likely to trespass, (b) the condition is one of which the land owner knows or has reason to know...and realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, (c) the children...do not discover the condition or realize the risk involved...
- (d) the utility to the land owner of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the land owner fails to exercise reasonable care...

### **Regulations & Administrative Laws**

Adding to the lack of clarity in this area,

is the fact that the Commonwealth's Department of Public Health lists a wide array of regulations for both private residential pools and semi-public pools. The penalty for violations of these regulations can include fines, and denial of a swimming pool permit. More importantly, a violation can also be significant in the event of a lawsuit. Generally, violations of regulations are offered as proof of a breach of reasonable conduct on behalf of the pool owner.

Private pools maintained at a residence can expose one to liability for the reasons outlined above. Thus, pool owners must keep their pools in reasonably safe condition, adequately warn guests of any dangerous conditions, and take measures to prevent children from wandering into the area of the pool. Diving boards are likely to increase the risk for injury and liability, and should be safely installed and maintained regularly. The use of excessive chemicals can irritate or cause injury to swimmers, and thus, precautions should be

instituted to properly test and treat the water.

The CDCP recommends the following

precautions for private pool owners:

- ▶ Install a four-sided fence, at least five feet high, that completely separates the pool from the rest of the yard.
- ▶ Install self-closing *and* self-latching gates, that open *outward*, with latches that are out of the reach of children.
- ▶ Install automatic door locks, or alarms to prevent unauthorized access.
- ▶ Remove floats, balls, and other toys from the pool and surrounding area immediately after use; their presence can encourage children to enter the pool area.

Exposure to liability can never be reduced to zero, but the above steps can reduce the potential for both injury and civil liability to pool owners.

### Semi-Public Pools

Semi-Public pools are those that are used in connection with one's stay at a hotel, motel, condominium complex, country club, or similar locations. Due to the fact that semi-public pools are open to visitors, public policy dictates that additional regulations will apply,

and arguably a higher standard of care than that of a residential pool.

The following is a brief summary of the requirements pursuant to 105 CMR 435.00, and the Department of Public Health:

Requirement	Semi-Public	Residential
filtration systems	√	√
water depth markings	√	√
slip-resistant walkways	√	√
minimum of two(2) ladders	√	√
13' clearance around diving boards	√	√
certified pool operator required	√	
posted sign: "shower before entering"	√	
lifeguards (if required by the Board of Health)	√	
posted warning if no lifeguard	√	

lifesaving ring buoy	√	
first-aid kit	√	
maximum bather capacity	√	√

drain, or sustaining severe injuries as a result of the pressure. According to the Consumer Product Safety commission, the pressure on a pool drain can be up to 300 pounds per square inch.

Attempts at swimming pool regulation to promote safety originate in almost every sphere of American law. Local town ordinances, state laws or administrative regulations, judicial opinions of the Supreme Judicial Court regarding premises liability, and federal acts all operate to define potential liability.

In December of 2008, a federal law regulating drain covers at semi-public pools took effect. The “Pool and Spa Safety Act” mandates that all public and semi-public pools install an anti-drowning cover on their pool drains. The Act is designed to prevent the horrific death of small children who were being held underwater by the suction of a pool

Whether you own a residential pool, and enjoy even an occasional guest swimmer, or a semi-public pool in conjunction with your small business, the risk and potential for civil liability exposure is ever-present. The laws and regulations surrounding premises liability, especially in the specific context of swimming pools, are particularly complex. An attorney licensed in the Commonwealth can advise you and offer opinions regarding the reduction of liability exposure. At a minimum, one should ensure compliance with all state and federal regulations.

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